

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR

BENCH, JAIPUR.

J U D G M E N T

Smt. Rukmani Devi Vs. Prabhu Narayan & ors.

S.B. CIVIL FIRST APPEAL No.122/1981
against the judgment & decree dated
dated 7.9.1981 passed by the ADJ
No.5, Jaipur City, Jaipur in Civil
Suit No.84/1980(82/1973).

Date of Judgment :: May 25, 2007

PRESENT

HON'BLE DR. JUSTICE VINEET KOTHARI

Mr. G.K. Garg for the appellant-defendant.
Mr. S.M. Mehta, Sr. Advocate along with
Mr. D.S. Poonia for the respondent-plaintiffs.

REPORTABLE BY THE COURT:

1. This appeal of defendant Smt. Rukmani Devi wife of Hari Narain is directed against the judgment and decree passed by the learned Additional District Judge No.5, Jaipur City, Jaipur in Civil Suit No.84/1980 (82/1973) in a suit of pre-emption filed by plaintiff Ganesh Narain.

2. The plaintiff came with a case that defendant No.2 Shanker Lal and defendant No.3 Babu Lal son of Shanker Lal had owned the property situated at Chokri Ghat Darwaja, Bakshi Ji Ka Chowk, Jatuka Ki Gali, near Bhagchand Ji Ki Haveli at Jaipur and the house of defendant Nos.2 & 3 and that of the plaintiff have a common chowk, a common pol and a common entrance. The

plaintiff further averred that since the defendant Nos.2 & 3 had sold the suit property to defendant No.1 Smt. Rukmani Devi, the present appellant without informing the plaintiff who had a prior right to purchase the said suit property being a co-sharer and having a common entrance, he filed the present suit claiming his right of pre-emption U/s.6 of the Rajasthan Pre-Emption Act, 1966. The plaintiff further stated in his plaint that the suit property was in fact sold for a sum of Rs.11,000/- only but the apparent consideration in the registered sale deed dated 8.6.1972 was shown to be more at Rs.14,999/-, therefore, the plaintiff was ready and willing to purchase the said suit property at the sum of Rs.11,000/- and in the alternative if the court comes to the conclusion that the real sale consideration is Rs.14,999/- then he is still ready and willing to purchase the said suit property at the said sale consideration of Rs.14,999/-.

3. The suit was contested by the present appellant, defendant No.1 who filed the written statement before the learned trial court and while admitting that the chowk and pol were common to the suit premises as well as to the residential house of the plaintiff, the defendant No.1 further stated that yet another owner of third residential house having the same common chowk and pol was one Mr. Bhajan Lal. The defendant further stated that

the plaintiff was in fact never willing to purchase the said property and he was even offered the said suit property to be purchased but he refused and thereupon with his consent and active participation only the defendant Nos.2 & 3 sold the said property to defendant No.1, the present appellant Smt. Rukmani Devi and, therefore, the plaintiff had no right of pre-emption and he was estopped in claiming such right of pre-emption over the suit property. It was further stated that the sale consideration of Rs.14,999/- was the only real sale consideration and the mere fact that the plaintiff was ready and willing to purchase the suit property only for the sum of Rs.11,000/- shows that he was not ready to purchase the said at the given sale consideration of Rs.14,999/- and, therefore, his right of pre-emption in any case stood defeated.

4. The learned trial court on the basis of pleadings of the parties framed the following issues in the matter:-

- (1) "Whether there exists a vested right of pre-emption in the plaintiff on the ground of chowk and poli of the parties portion of house being in common?
- (2) Whether the sale under dispute has been effected for Rs.11,000/- only as against the amount of Rs.14,999/- entered as sale price in the sale deed?
- (3) Whether the defendants No.2 & 3 sold the property in dispute to defendant No.1 without giving any notice required to be

given under section 8 of the Rajasthan Pre-emption Act?

(4) In case the issue No.2 is decided against the plaintiff, is the court fee deficient? If so, its effect on the suit?

(5) Whether the plaintiff himself refused to purchase the suit property on the effect having been made to him and aided and assisted the disputed sale? If so, whether the principle of estoppel by acquiescence applies against the plaintiff?

(6) Whether the right of pre-emption provided in Rajasthan Pre-emption Act is violative of Art.19 of the Constitution of India? If so, to what effect?

(7) Relief?"

5. The learned trial court after taking the evidence and examining the various witnesses namely Pw.1 Ganesh Narain, Pw.2 Bhonri Lal and Pw.3 Ramjani on the plaintiff side and Dw.1 Hari Narain (husband of Smt. Rukmani Devi), Dw.2 Moti Lal, Dw.3 Shiv Karan and Dw.4 Shanker Lal and documentary evidence Ex.1 registered sale deed and Ex.2 reply of the notice, came to the conclusion that the plaintiff was entitled to be substituted in the sale deed and thus decreed the suit in favour of the plaintiff. Hence this appeal by the defendant No.1.

6. Heard learned counsel and perused the record including the documentary evidences and statements of various witnesses.

7. The map Ex.A-2 shows that the residential house of the plaintiff Ganesh Narain is situated on the left of a common chowk of 17'3" x 22'3" which chowk is common to three residential units. One belonging to the plaintiff on the left of the said chowk, one belonging to the defendant Nos.2 & 3 which was sold to defendant No.1 on the right side of the said chown and one belonging to Bhajan Lal. Two independent stair case from the said chowk lead to the residential house of the plaintiff on the one side and to the suit premises on the other side. The said chowk can be accessed from a outer chown of 26'9" x 15'9" which chowk is on the front of the Gali Bakshi Ji Ki and from the said outer chowk a small pol having width of 3'9" exists and on the both sides of the said pol the rooms of residential units belonging to Bhajan Lal, who is not a party to the present suit but is a co-owner of the portion of the residential house in the north south of the said inner chowk , exist.

8. Plaintiff Pw.1 Ganesh Narain has stated in his statement that chowk, pol and entrance of his house and suit property was common and defendant Nos.2 & 3 had sold the suit property for the sum of Rs.11,000/- only whereas registry was deliberately got done at a figure of Rs.15,000/- so that in case of his right of pre-emption being decreed he could be required to pay the higher sum of Rs.15,000/-. In his cross examination he has stated

that the said sum of Rs.15,000/- was given in the presence of Registrar was not known to him. Bhonri Lal, Pw.2 had told him that the transaction was finalised at Rs.11,000/-. Shanker Lal, defendant No.2 had himself told him that the house was sold for Rs.11,000/-. In his cross examination he however admitted that there was separate stair case for going to the house of the plaintiff and to defendant No.1. Pw.2 Bhonri Lal stated in his examination in chief that the chowk and pol of the said Haveli was common and Shanker Lal, defendant No.2 had told him that his house would be sold for Rs.11,000/-. In his cross examination he admitted that there was no common passage through the suit premises to the residential house of the plaintiff and the entrance stair case was separate for the two residential houses having the said common chowk. Similarly Pw.3 Ramjani has stated almost same facts as stated by Pw.2.

9. As against this, Dw.1 Hari Narain, husband of defendant No.1 Smt. Rukmani Devi has stated that the suit property was by registered sale deed dated 8.6.1972 for the sum of Rs.14,999/- which was the real sale consideration of the suit property and on the said sale deed the attesting witnesses were Chagan Lal and Banshidhar. He has further stated that the plaintiff Ganesh Narain himself had shown the suit property to them and he was fully aware of the sale transaction and in

fact it was offered to him also for purchase but he refused to do so at the aforesaid sum of Rs.15,000/-. The plaintiff himself had got the map of the suit property prepared and had taken him to the place of Basanti Lal for drafting of the registered sale deed. Even at the time of registration of the said sale deed he accompanied them but remained outside the office of the Registrar. The said witness also stated that the residential house of Bhajan Lal Mali was situated in between the house of the plaintiff and the suit property. The commonness of chowk and pol was however not disputed by Dw.1. He has stated in his cross further that the shop of defendant Dw.1 and that of the plaintiff was in the same street and they knew each other very well and the transaction of purchase of suit property was also mentioned by him to the plaintiff about two months before the registry. Dw.2 Moti Lal has supported the defence version by saying that plaintiff Ganesh Narain only helped in purchase of the suit property by Smt. Rukmani Devi wife of Hari Narain for the sum of Rs.14,999/- and the said sum of Rs.14,999/- was given by Hari Narain to defendant Nos.2 & 3 in the presence of the Registrar. He has also stated that there is no common passage for going from plaintiff's house to that of defendant No.1, the suit premises. In his cross examination he stated that he is employed in the shop of Hari Narain, husband of defendant No.1. At the time of registration he had accompanied Hari

Narain to the Collectorate where plaintiff, defendant No.1 Smt. Rukmani Devi, defendant No.2 Shanker Lal and defendant No.3 were also present. He did not however know why attestation of plaintiff Ganesh Narain was not obtained on the registered sale deed. Dw.3 Shiv Karan also an employee of Hari Narain has supported the defence version in the similar manner as aforesaid. The vendor Shanker Lal himself was examined as Dw.4 and he has also supported the case of the defendant No.1 and said that he waited for almost one year after offering to sell the suit premises to the plaintiff Ganesh Narain as he had to marry off his four daughters but the plaintiff never agreed to purchase and kept on dilly-dallying about the same. He has also stated that he sold the house to defendant No.1 for the sale consideration of Rs.14,999/- and the plaintiff Ganesh Narain was also present at the time of registration of the sale deed.

10. Mr. G.K. Garg, learned counsel for the defendant appellant Smt. Rukmani Devi has submitted that the plaintiff Ganesh Narain could not be said to be co-sharer of the suit property as envisaged U/s.6 of the Act and, therefore, the case set up by the plaintiff U/s.6(1)(i) of the Act was not established by the plaintiff and the suit has been wrongly decreed by the learned trial court. He further submitted that the common chowk and entrance pol was common to residential units belonging to three

different persons namely plaintiff Ganesh Narain, Bhajan Lal and defendant Nos.2 & 3 Shanker Lal and Babu Lal but since there was separate stair case to both the properties namely that of the plaintiff and defendant No.1, the case of the plaintiff was not even covered by clause (ii) of Section 6(1) of the Act. He urged that the right of pre-emption is a weak right and in view of the case set up by the plaintiff on shifting sands, the suit did not deserve to be decreed. He further submitted that the mere fact that the plaintiff offered to purchase the said suit property only for a sum of Rs.11,000/- and later on actively participated in the sale transaction between defendant Nos.2 & 3 and defendant No.1 Smt. Rukmani Devi establishes that the plaintiff had full knowledge and had acquiesced in the matter and, therefore, he should be deemed to have given up his right of pre-emption and, therefore, he had no right to be substituted by the decree of the suit. He relied upon the judgment of Hon'ble Supreme Court in **Indira Bai Vs. Nand Kishore** [AIR 1991 SC 1055] to the effect that the right of pre-emption is a weak right and it can be defeated by estoppel. The Hon'ble Supreme Court in the said case further held that the approach of the High Court that no estoppel could arise unless notice U/s.8 of the Act was given by the seller and pre-emptor should have had occasion to pay or tender price, ignores the fallacy that estoppel need not be specifically proved as it can always

be used as a weapon of defence. He further relied upon the decision in case of **Madhusudan Das Vs. Smt. Narayani Bai** [AIR 1983 SC 114] to the effect that mere relationship between the witnesses and the parties to the suit was no ground for rejection of evidence and in such cases it is incumbent on the court to exercise proper caution when appraising his evidence and to examine its probative value with reference to the entire mosaic of facts appearing from the record.

11. On the other hand, Mr. S.M. Mehta, Senior Advocate argued that the case of the plaintiff respondent fell under both the clauses of Section 6(1) of the Act. The plaintiff was not only co-sharer of the property in question but also on account of admitted fact of common entrance and common chowk between two properties, the plaintiff was clearly entitled to pre-emption i.e. the right to be substituted in the sale deed made in favour of the defendant No.1 Smt. Rukmani Devi. He submitted that in view of admission of the defendant about the commonness of the entrance pol and chowk, nothing further was required to be established by the plaintiff and he was entitled to the decree of pre-emption which was rightly given by the learned trial court and no interference in the same was called for by this Court in the present appeal. He relied upon the judgments in **Smt. Prem Dulari Vs. Smt. Raj Kumari & another** [AIR 1967 SC

1578], **Jagan Nath Vs. Radhey Shyam & another** [1960 (10) ILR (Raj.) 75], **Babulal Vs. Madadeen & others** [AIR 1988 Raj. 143], and **Hazari & others Vs. Naki (dead) by his legal representatives & others** [AIR 1968 SC 1205]. The last two judgments cited by Mr. Mehta are to the effect that the death of decree holder who claimed right of pre-emption does not abate as a statutory right of pre-emption with the death of the plaintiff. The decision of Hon'ble Supreme Court in **Smt. Prem Dulari Vs. Smt. Raj Kumari** (supra) has been relied upon in support of the submission that there is nothing in Section 15 of J & K Right of Prior Purchase Act, 1993 to warrant the construction that such a right would vest only if the common outer entrance is jointly owned by the owners of such houses. What the section requires is the existence of a common outer entrance which need not be owned by the person claiming the right of pre-emption.

12. Having heard the arguments of the learned counsel and upon perusal of the record and relevant case laws, this Court is of the opinion that the present appeal of the defendant No.1 deserves to be allowed.

13. In order to claim the right of pre-emption U/s.6 of the Rajasthan Pre-Emption Act, 1966 two conditions are necessary, (1) the pre-emptor should be either a co-sharer or partner in the property transferred and (2)

there should be commonness of the stair case or an entrance or other right or amenity common to suit property and the property owned and possessed by the pre-emptor. Section 8 of the said Act further requires a notice by the vendor to the pre-emptor which can be waived if after such a notice the pre-emptor within two months from the date of such notice does not tender or pay the price specified in the notice given U/s.8 of the Act. It is also well settled that rule of estoppel applies in such cases. This Court from the evidence on record finds that the plaintiff had full knowledge of the sale transaction in question and he in fact actively participated in the same and gave up his right of pre-emption after allowing the registration of the sale deed in favour of defendant No.1 without any demur or objection raised during the contemporary period. He was ready and willing to purchase the suit property only for the sum of Rs.11,000/- and the bare perusal of the plaint shows that he kept his right of pre-emption hanging in balance and left to the court that if the court comes to the conclusion that the real sale consideration was Rs.14,999/- and not Rs.11,000/- then also he would purchase the suit property at Rs.14,999/-. The scheme of the Act shows that once the pre-emptor is put to the notice, he has to exercise this right of pre-emption within two months by paying the price for which the transaction in question is going to take place. Dw.4

Shanker Lal, vendor himself has stated before the learned trial court that he informed the plaintiff about the said transaction and he in fact he was pursuing the plaintiff for the last one year to purchase the suit property but he refused to do so and adopted a dilly-dallying approach towards the same. Thereafter when the transaction with defendant No.1 also was finalised at Rs.14,999/- the plaintiff acquiesced in the matter and actively participated in the said sale transaction and the mere fact that he was present at the time of registration of the sale deed in the Collectorate, which fact has never been disputed and denied by him, shows that he had no objection to the said sale taking place in favour of defendant No.1. In view of the legal position that the right of pre-emption is a weak right and the plaintiff pre-emptor if he waives or gives up his right without raising any objection to the sale taking place in favour of third party, the court should not allow substitution in the sale deed at the instance of such plaintiff pre-emptor who has already given up his right.

14. The Hon'ble Supreme Court in **Bishan Singh & ors. Vs. Khazan Singh & anr.** [AIR 1958 SC 838] while dealing with the case arising under Punjab Pre-emption Act also held that the right of pre-emption being a very weak right, it can be defeated by all legitimate methods such as a vendee allowing the claimant of a superior or equal right

being substituted in his place. This Court in **Roopi Bai Vs. Mahaveer & ors.** [AIR 1994 Raj. 133] held that the right of pre-emption can be lost by estoppel and acquiescence where the property is alleged to have been offered to sale to plaintiff by vendor before it was sold to defendant/ purchaser and the presence of plaintiff at the time of registration of sale deed and this probability that plaintiff was actively associated with execution of sale deed. This Court in S.B. Civil First Appeal No.18/1997 (Radhey Shyam Vs. Vinod Kumar & anr.) decided on 23.2.2007 also held that where the plaintiff had acquiesced in the matter and waived his right of pre-emption and such waiver could be even inferred on the basis of an oral or constructive notice to the pre-emptor, the suit could not be decreed on the right of pre-emption. The cases relied upon by the learned counsel for appellant also support the case of the appellant, whereas those referred by learned counsel for respondent-plaintiff are distinguishable.

15. Thus, in view of the aforesaid, the present appeal is allowed and the impugned judgment and decree of the learned trial court dated 7.9.1981 is set aside and the Civil Suit No.84/1980 (82/1973) filed by the plaintiff Ganesh Narain is rejected. No order as to costs.

(Dr.VINEET KOTHARI), J.

VS/